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JUN 28 1991

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Application of )  
 )  
 )  
EZ COMMUNICATIONS, INC. ) File No. BRH-910401C2  
 )  
 )  
For Renewal of License of FM )  
Radio Station WBZZ(FM), )  
Pittsburgh, Pennsylvania )  
  
TO: The Commission

PETITION TO DENY

**ALLEGHENY COMMUNICATIONS  
GROUP, INC.**

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Date: June 28, 1991

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**SUMMARY**

Allegheny Communications Group, Inc. (Allegheny) herein petitions to deny the renewal application of EZ Communications, Inc. (EZ) for WBZZ(FM), Pittsburgh, Pennsylvania. Allegheny is a competing applicant for that facility.

This Petition is based on final adjudications against EZ arising from false and indecent remarks made on the air with respect to a female employee of WBZZ. The adjudications raise issues as to violations of FCC rules and policies and as to non-FCC misconduct relevant to EZ's character qualifications. In addition, a recent settlement arising from this matter raises further questions as to whether EZ has abused the Commission's processes by obstructing Commission and public access to information relevant to its application and whether EZ has violated the Commission rule concerning compensation to a prospective petitioner to deny.

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PETITION TO DENY

Allegheny Communications Group, Inc. (Allegheny),

by its attorneys hereby petitions to deny the above

I. Recent Adjudications Raise Issues  
Concerning EZ's Qualifications

This Petition arises from two adjudications of misconduct against EZ and/or its employees arising from statements made on the air concerning another WBZZ employee, Elizabeth Nelson (Liz) Randolph. As will be developed, these adjudications raise questions as to EZ's character qualifications that must be considered pursuant to the Policy Statement on Character Qualifications In Broadcast Licensing, 102 FCC 2d 1179, 59 RR 2d 801 (1986)

- 3 -

Attachment No. 1 is a November 16, 1988 Award of  
Arbitrator and Opinion sustaining a grievance brought by

"It says, 'Let go of my ears, I'm doing the best I can.'"

The Arbitrator found "no question that this 'joke' alludes to the performance of oral sex." Award at p. 5. He characterized it as "vile and filthy." Upon learning of this "joke," Ms. Randolph became distraught and left the station, for which she was subsequently discharged. The Arbitrator found that Ms. Randolph's conduct in leaving the station was justifiable notwithstanding the general principal that an employee may not engage in "self-help" in response to a perceived grievance but must pursue ordinary grievance procedures. The Arbitrator held at p. 13:

"I would find it unreasonable to require the grievant to have remained on the job after being subjected to such vile and lewd insults and be expected merely to file a grievance."

The result was affirmed by Judge Ziegler. As reflected

which means that the Defendants had a "high degree of awareness of the probable falsity of the comments when broadcast." Tr. 20. The Judge also made clear that a finding of defamation required "false representation or statement of fact..." Moreover, it was required that the comments be statements of fact or reasonably construed as such. Thus, if the comments could not reasonably be construed as "portraying actual facts", defamation could not be found. Tr. 19.

On August 17, 1990, the Court denied post-trial relief sought by Defendants except for a minor adjustment in the amount of damages. See Attachment No. 6 hereto. As of the filing of EZ's instant application, the case was pending on appeal, as reflected in Exhibit 6 of the application.

Ms. Randolph also filed a complaint with the Pennsylvania Human Relations Commission alleging violations of State law against sex discrimination and, after receiving a right to sue letter from that agency, she commenced an action in the Court of Common Pleas of Allegheny County (Case No. GD89-22010). Her Complaint and Amended Complaint is attached hereto as Attachment No. 7 (exclusive of copies of the arbitration decisions attached to the Complaint).

On May 24, 1991, a settlement was entered into between EZ and Ms. Randolph with respect to both



Ms. Randolph and assessed damages in the amount of \$694,204. Attached hereto as Attachment No. 3 is the jury's verdict and as Attachment No. 4 the Amended Complaint on which it is based.<sup>1</sup>/ Most particularly, in connection with the defamation counts, Ms. Randolph alleged, and the jury agreed, that various allegations of sexual misconduct against her "where wholly false and were published with the intent of and for the purpose of injuring" Ms. Randolph and, further, constituted "a false and malicious slander." See, e.g., p. 10 of the Amended Complaint. The nature of the jury's finding is also clarified by the charges given to the jury by the Judge. A transcript of pertinent excerpts from a February 13, 1990 session in which the charges were given is attached hereto as Attachment No. 5. It will be seen, with reference to the defamation count, that Ms. Randolph was treated as a public figure which placed on her the

GD88-02730 (the defamation case) and GD89-22010 (the sex discrimination case). Attached hereto as Attachment No. 8 is a Declaration of Lewis I. Cohen, Allegheny's counsel, detailing his efforts to obtain documentation concerning the settlement from the Court. As reflected therein, the only information from either record still available was transcript of a May 24, 1991 settlement hearing with the Judge. This was in a sealed envelope; however, Mr. Cohen was ultimately allowed to inspect the transcript and take notes, but not to photocopy it. He copied the transcript verbatim except for that portion dealing with mutual releases, which is attached to his declaration. As reflected therein, both civil cases have been settled and discontinued. The amount of the settlement is not disclosed. In addition, Ms. Randolph is obligated to withdraw a "letter of inquiry" filed with this Commission and to refrain from filing any further "complaint" with this Commission or assisting anyone else in so doing. Moreover, Ms. Randolph is obligated by a Court ~~order enforcing the settlement to refuse to testify~~

jury's February 14, 1990 verdict final. Thus, there now exists "an ultimate adjudication by an appropriate trier of fact" which will not be the subject of any further appellate review. Character I, 59 RR 2d at 819-20.

**B. The Adjudications Reflect FCC-Related Misconduct**

Under Character I, the Commission has defined areas of FCC related misconduct that are deemed to impact a licensee's character qualifications, including violations of FCC rules and policies. The adjudicated misconduct raises substantial and material questions of violations of FCC rules and policies.

## 1. News Distortion

\_\_\_\_\_ ~~advised~~ ~~next~~ ~~time~~ ~~to~~ ~~include~~ ~~the~~  
\_\_\_\_\_

America, 20 FCC 2d 143, 17 RR 2d 674, 683 (1969). The jury's defamation verdict provides the requisite extrinsic evidence. It constitutes a finding that the Defendants - including EZ - either knew that the matter being broadcast was false or were aware of a high probability that it was false. Rather, the Defendants - including EZ - proceeded with both intent and malice as alleged in Ms. Randolph's complaint. The requirement for extrinsic evidence of intentional distortion is designed to ensure against inappropriate involvement in a licensee's news judgment; however, the defamation verdict clearly negates any such concern. The Commission indicated in Hunger In America:

Rigging or slanting the news is a most heinous act against the public interest - indeed, there is no act more harmful to the public's ability to handle its affairs. In all cases where we may appropriately do so, we shall act to protect the public's interest in this important respect."

17 RR 2d at 684. Commission action is clearly appropriate where the purported "news" has already been adjudicated to be an unlawful defamation.

The news distortion also relates to a former Commission policy in a manner contemplated by para. 67 of the Policy Statement. Thus, former Section 73.4205 of the Rules precluded private interest broadcasts by licensees to harass or annoy others. Trans-Tel Corporation, 33 FCC 2d 840, 23 RR 2d 840 (1972). It is evident that EZ employed titillating slanders for the

obvious private purpose of boosting the ratings of WBZZ's morning show, which conduct was found to reflect the intentional inflection of emotional distress.<sup>2/</sup> The use of a broadcast facility for the private purpose of self-promotion in such a harassing manner through the dissemination of false "news" concerning Ms. Randolph is devoid of even an arguable public interest justification.

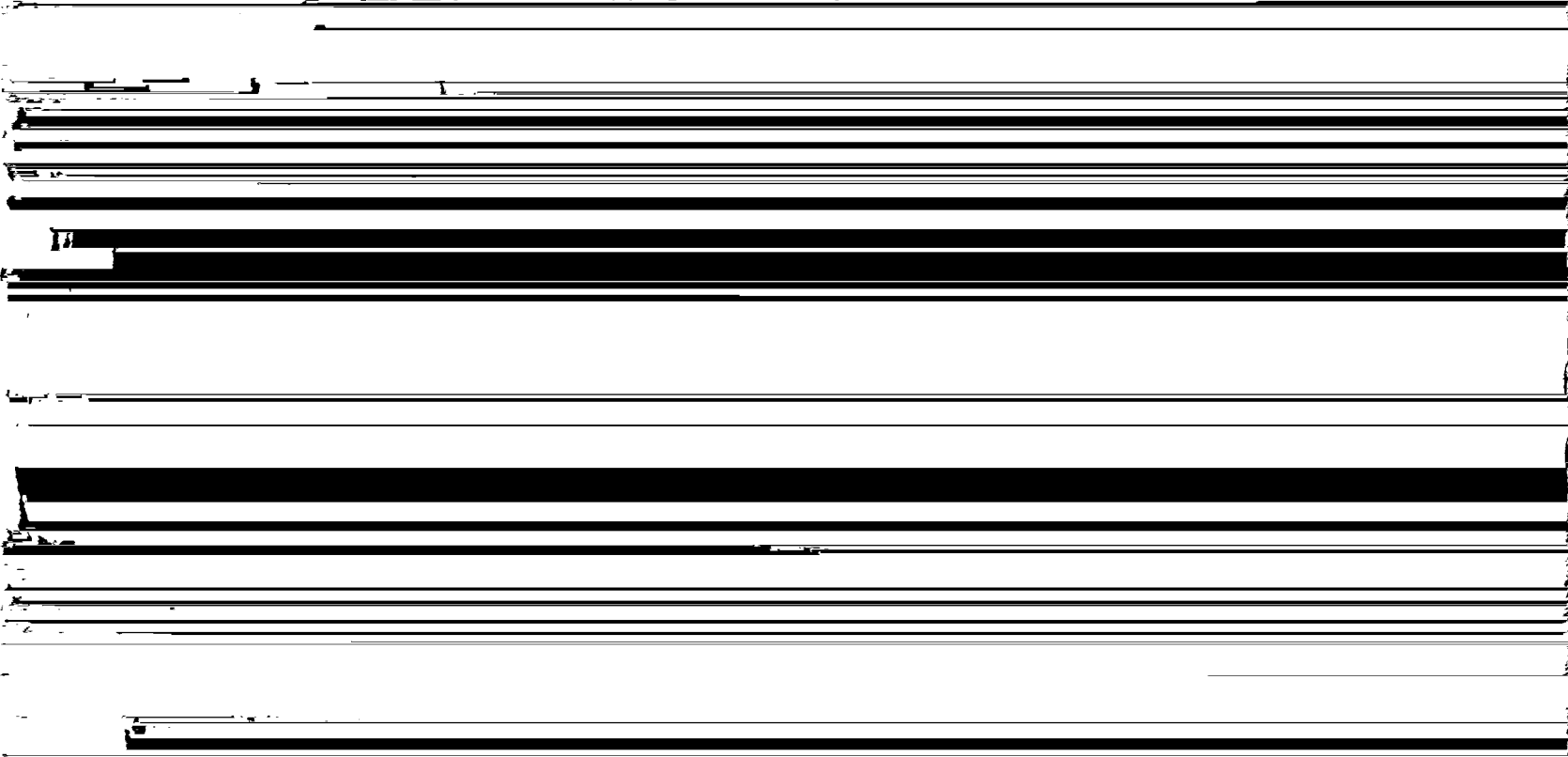
2. Indecency

The adjudications raise a substantial and material question of fact as to whether EZ violated 18 U.S.C.

§ 1464 by broadcasting material consisting of indecent

exchange is cited verbatim above, which the arbitrator found to be an unquestionable allusion to the performance of oral sex. Other comments suggested that Ms. Randolph engaged in sexual intercourse with the captain and crew of a cruise ship on which she was vacationing (Complaint, para. 14); that she had indiscriminate sex with many people (Complaint, para. 22); that she had contracted so many sexually transmitted diseases that she knew by heart all the special hotlines for the Center For Disease Control in Atlanta, Georgia (Complaint, para. 52); that the Marine Corps anniversary was a very special day for her since she has a very personal sexual relationship with the Marine Corps (Complaint, para. 72); and that she was having sex with a number of the Pittsburgh Penguins (Arbitrator's Opinion, p. 4).

The patently offensive nature of the material broadcast is demonstrated by the uniformly adverse



Arbitrator characterizes them as "ongoing lewd comments..." Judge Ziegler at p. 2 of his Opinion refers to them as "tasteless, sexual quips," "outrageous jokes" and characterizes the January 22, 1988 remark as referring "to oral sexual activity in an offensive manner." The reaction of the jury is, of course, not memorialized in an opinion but is reflected by verdicts in favor of Ms. Randolph on all counts before the jury and the substantial damage award made by the Jury.

There are thus substantial and material questions of fact that patently offensive sexual discussion occurred during periods when children might be listening. There is a far greater basis that is usually the case for finding such questions, which are ordinarily premised on the Commission's impressions. Here, the Commission also has the impressions of a professional arbitrator, a member of the Federal judiciary and a jury empaneled within the station's service area. The Court in Monroe Communications Corporation v. FCC, 900 F. 2d 351, 67 RR 2d 843 (D.C. Cir. 1990) (Monroe), rejected a prior policy that sought to exclude violations of 18 U.S.C. §1464 from consideration in the renewal context. The Court held:

"...obscene broadcasts like a number of other factors, bear on the public interest as evidenced by the obscenity statute. The Commission is supposed to consider the public interest in evaluating license applications. The Commission

cannot reasonably carve out one factor bearing on the public interest and claim that that factor, in contrast to the others, can only be considered in a renewal expectancy evaluation if that factor has been previously raised."

67 RR 2d at 847-48.<sup>3/</sup> This is particularly so in the present context where the principal issue is whether the adjudications of misconduct by authorities other than the Commission raise questions impacting EZ's character qualifications. The premise of the character policy is that such adjudications would be pertinent to the extent they reflect on the likelihood of compliance with FCC rules and policies. The adjudicated conduct clearly does, even if it were held that for procedural reasons past violations of the indecency policy would not be independently considered.

### 3. Discrimination Against A Female

Section 73.2080(a) of the Rules provides that "no person shall be discriminated against in employment by such stations because of ...sex." The adjudications

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<sup>3/</sup> Monroe directly concerned the obscenity aspect of 18 U.S.C. §1464; however, the same considerations must necessarily apply to indecency, which arises from the same statutory provision. Monroe also did not wholly foreclose the possibility that the Commission could provide an acceptable alternate justification for the practice therein rejected by the Court. That possibility is immaterial to the present case since Monroe further indicated that the Commission would have to give the public prior notice of any such procedural rule. 67 RR 2d at 848. No notice of any such rule has been given to date. The prior policy cited in footnote 2 of Monroe, 67 RR 2d at 848 n.2, must be applied.



raise substantial and material questions of fact as to whether Ms. Randolph was the victim of sexual discrimination. This is reflected in the Arbitrator's Opinion at p. 12 wherein he stated:

"I find a parallel exists in this situation with circumstances that precipitated and are now governed by the Federal Government's Sexual Harassment Laws. An employee no longer has to put up with a hostile work environment that is created on the basis of sex, be it in the form of jokes, comments, suggestions, touching, etc."

Moreover, although Ms. Randolph was ostensibly a newscaster, EZ evidently viewed her job an encompassing "banter" designed to make her appear sexually loose, such as wearing a revealing outfit to work, as reflected at p. 8 of the Arbitrator's Opinion, which recounts EZ's position as presented to the Arbitrator. The Arbitrator found at p. 11-12 of his Opinion that such "banter" was indeed a requirement of her job. Moreover, the "banter" was clearly sexual in nature and became increasingly lewd and offensive. As noted at p. 14 of his Opinion, the Arbitrator found that EZ must have been "aware of or at least strongly suspected" that Ms. Randolph found this treatment objectionable; however, EZ did nothing to address the situation until Ms. Randolph could no longer take it. Then, she was fired. This course of events was obviously a function of Ms. Randolph's sex. A male newscaster would not have been similarly abused.

It is evident that, although hired as a

professional newscaster, Ms. Randolph, because of her sex, was in fact treated as a stereotypical "bimbo", which role she was expected to assume as a condition of employment. What makes the situation particularly egregious is that this discriminatory attitude was not limited to the workplace but was communicated to the general public as an on-going part of the station's programming. Thus, this is not a matter that impacts only Ms. Randolph (although she pursued remedies for unlawful discrimination until the settlement) but also impacts the public at large, who were equally victims of EZ's discriminatory conduct. The Commission's concern in this area had its genesis in the proposition that discriminatory employment practices are likely to impact a licensee's ability to program in the public interest.

"...civil misrepresentations not involving governmental units may be relevant to a broadcaster's character qualifications."

The Commission indicated that such "civil misrepresentation" would be assessed on a case-by-case since not all misconduct of that nature would be "presumptively" relevant. The jury's finding of defamation is clearly relevant. It is clear that the jury's finding serves to establish misrepresentation of an intentional and malicious nature. Moreover, the misrepresentation was made to the general public using the very broadcast facility for which renewal is now sought. It is difficult to imagine a "civil misrepresentation" more intimately related to the Commission's ultimate responsibility of protecting the public with respect to the use of the broadcast spectrum. The Commission clearly cannot grant without a hearing the renewal application of a licensee which used its facility for the purpose of making an adjudicated "civil misrepresentation" to the general public.

Given especially that the defamation issue is clearly within the scope of relevant non-FCC misconduct, all aspects of the adjudications are appropriately considered even if viewed solely as non-FCC misconduct. Thus, the adjudications relate entirely to law violations occurring in connection with the broadcast operation for which renewal is now sought. Even if it were found that

they did not directly violate an FCC rule, the unlawful behavior clearly raises a question as to whether EZ can be relied upon to conduct its broadcast operations in a lawful manner. A proclivity to conduct broadcast operations in a manner inconsistent with applicable law necessarily encompasses a proclivity to violate requirements imposed by the FCC, which is the ultimate concern of the character policy. Character I, 59 RR 2d at 809. This is particularly so given that the general formulation of relevant non-FCC misconduct is under present policy designed only to guide Commission action and not to restrict the Commission's discretion to respond appropriately to particular situations that arise. Character III, 67 RR 2d at 1107; Character IV, para. 6.

D. The Settlement Raises Abuse of Process Issues

As noted, the pending litigation was settled on May 24, 1991. As reflected in the transcript of the settlement conference included in Attachment No. 8, the

Attachment was reviewed and approved by the Commission on May 24, 1991.

places a "gag" order on Ms. Randolph of such dimensions that she is obligated under threat of contempt to refuse to honor any subpoena that might be issued by this Commission. Further, the settlement results in the record in the litigation being entirely sealed, making potentially relevant facts unavailable to prospective objectors and the Commission.

It in fact is obvious that a principal if not primary purpose of the settlement was to obviate potential adverse impact of the adjudication on EZ's instant renewal application. Thus, the jury verdict was entered on February 14, 1990. No settlement occurred for over a year until shortly prior to the July 1, 1991 deadline for filing competing applic<sup>o</sup>n<sup>s</sup> and petitions to deny. Moreover, the settlement occurred only shortly after the release of public notice of the adoption of Character IV which at least served to create uncertainty as to whether the Commission would view the defamation adjudication as irrelevant non-FCC misconduct. Report No. GN-73, released May 9, 1991 (Attachment No. 9 hereto).

The actions of EZ in obstructing the ability of both interested parties and the Commission to obtain information potentially relevant to its pending renewal application constitutes a clear abuse of the Commission's processes. The Commission's ability to assess whether

the grant of an application would be consistent with the public interest standard prescribed by Section 309(a) of the Act is necessarily dependent on its ability to receive information from interested members of the public or to obtain information through its own investigative and hearing processes. There can be no more fundamental abuse of the Commission's processes than for an applicant to attempt to obstruct both sources of information.

It is well-settled that it is an abuse of process for a party to attempt to induce, entice, coerce or otherwise improperly influence a witness or prospective witness in a Commission proceeding. Chronicle Broadcasting Co., 19 FCC 2d 240, 16 RR 2d 1014 rev. denied 23 FCC 2d 162, 19 RR 2d 204 (1970) (Chronicle); Harvit Broadcasting Corp., 35 FCC 2d 94, 24 RR 2d 352, 356-57 (Rev. Bd. 1972); Kaye-Smith Enterprises, 98 FCC 2d 675, 56 RR 2d 252, 258 (Rev. Bd. 1984). It is clear that EZ has both induced and coerced Ms. Randolph in an egregious manner. Thus, she has been paid not to testify even if subpoenaed by the Commission, subject to enforcement by the contempt power of a state court.

This abusive tactic is compounded by EZ's action in procuring the sealing of the record concerning the litigation. This tactic could have no purpose other than obstructing Commission and public inquiry into this matter. Thus, as reflected in Mr. Cohen's Declaration,

the record was previously publicly available. Indeed, the sealing occurred well over a year after the trial. The sealing accordingly does not serve to maintain the confidentiality of matters that were never public knowledge. It merely operates to obstruct documentation at this juncture of matters long known to the public.

designed to deter Ms. Randolph but are rather directed at other possible participants in Commission proceedings concerning EZ. Indeed, it is questionable whether a restriction even on Ms. Randolph's right to bring pertinent information to the Commission's attention could be squared with the public interest. WWOR-TV, Inc., 6 FCC Rcd 131 (ALJ 1991) at para. 64. It is wholly objectionable and abusive for a party to create obstructions under the guise of settling private litigation that are clearly intended to hinder participation in Commission proceedings by members of the public unrelated to the litigation.

Finally, EZ's conduct raises a question as to whether EZ has violated Section 73.3589 of the Rules. The Commission therein restricts payments in exchange for refraining from filing a petition to deny or an informal objection. It is clear from the transcript of the settlement conference that one purpose of the settlement was to procure Ms. Randolph's agreement to so refrain. Pursuant to Section 73.3589(b), it was EZ's responsibility to report the payment and demonstrate compliance with applicable restrictions. Insofar as Allegheny has been able to ascertain, this has not been done.

E. Questions Are Raised Relevant To Renewal Expectancy

Although character is generally not considered on a comparative basis, an exception arises where a renewal



applicant claims a renewal expectancy (as EZ doubtless will). Character I at footnote 125; Character IV at para. 14. The adjudications finding law violations directly relating to the programming of WZZA would

